

APPLICATION FOR
DISTRICT COURT JUDGESHIP
Fourth Judicial District

A. PERSONAL INFORMATION

1. Full Name: Tracy Labin Rhodes
 - a. What name do you commonly go by? Tracy
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes.
3. Home Address: [REDACTED]
Phone: [REDACTED]
4. Office Address: Same as above
Phone: (406) 549-3309; (406) 214-8641 (cell)
5. Length of residence in Montana: 15 years
6. Place of residence for the last five years: Missoula, MT

<u>Dates</u>	<u>City</u>	<u>State</u>
2004 -present	Missoula	MT

B. EDUCATIONAL BACKGROUND

7. List the names and location of schools attended beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
Buffalo Seminary	Buffalo, NY	1987	Diploma
University of Notre Dame	South Bend, IN	1991	B.A.
University Catholique De l'Ouest	Angers, France	1988-89	Study abroad
Stanford Law School	Palo Alto, CA	1994	J.D.

8. List any scholarships, awards, honors and citations that you have received:

- **Skadden Fellowship, 1994-1996**

The Skadden Fellowship is a prestigious two-year fellowship awarded annually by the Skadden Fellowship Foundation to 25 talented young lawyers across the nation to allow them to pursue public interest law on a full-time basis. As a member of the Lower Mohawk Band of Indians and a descendant of the Seneca Nation, I applied for the Skadden Fellowship to work at the Native American Rights Fund, a national nonprofit law firm representing Native American tribes and tribal members in their fights for justice.

- **Lyons Award for Service, 1994**

Awarded for co-developing a Stanford Law School course, “Native American Common Law and Legal Institutions.”

- **U.S. Department of Education Indian Fellowship, 1993**

Received a competitive, merit-based scholarship for a full year’s law school tuition.

9. Were you a member of the Law Review? If so, provide the title and citation of any article that was published and the subject area of the article.

Executive Editor, Stanford Journal of International Law, 1992-94

Published law review articles:

- *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 NEW ENG. L. REV. 695 (2003). Discussed the birth and purpose of the Tribal Supreme Court Project and delved into the legal issues involved in *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).
- *2000 Tribal Law & Governance Conference Case Reconsideration, United States v. Kagama, Appellant’s Brief* (with Keith Harper), 10 KAN. J. L. & PUB. POL’Y 419 (2001). Reargued an 1886 Supreme Court Indian law case.

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
• Montana Supreme Court	August 10, 2004
• United States Supreme Court	February 23, 1998
• United States Court of Appeals for the Eighth Circuit	January 5, 1996
• United States Court of Appeals for the Tenth Circuit	December 2, 1994
• United States Court of Appeals for the Federal Circuit	November 2, 1995
• United States Court of Federal Claims	August 15, 1997
• United States District Court for the Western District of Oklahoma	September 23, 1997

11. Indicate your present employment. (List professional partners or associates, if any).

Tracy Labin Rhodes, P.L.L.C., incorporated 2018, owner since 2005

12. State the name, dates and addresses of law firms with which you have been associated in practice, governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
Tracy Labin Rhodes, P.L.L.C. Missoula, MT	Sole Owner	2018-present
Tracy Labin Rhodes Missoula, MT	Sole Practitioner	2005-2018
Alexander Blewett III, School of Law at the University of Montana 32 Campus Dr. Missoula, MT 59812	Acting Director, Indian Law Clinic and Visiting Associate Professor	2004-2005

Native American Rights Fund
1712 N. St., NW
Washington, D.C. 20036

Skadden Fellow,
Senior Staff Attorney

1994-2004

1506 Broadway
Boulder, CO 80302

Missoula County
Missoula, MT

Substitute
Justice of the Peace

2017-2018

Fourth Judicial District Court
Missoula, MT

Special Master
Settlement Master

2016-2018

Fort Belknap Tribal Court of Appeals
Harlem, MT

Appellate Judge

2016-2018

**Tribal Court of the Confederated Salish
and Kootenai Tribes
of the Flathead Reservation,**
Pablo, MT

Judge Pro Tempore

2010-2018

Fort Peck Tribal Court
Poplar, MT

Special Judge

2013-2014

13. If you have not been employed continuously since completion of your formal education, describe what you were doing.

Between 2007-2015 I limited my time as an attorney to doing periodic contract work for a local attorney, and individual case appointments as Special Judge for the Confederated Salish and Kootenai Tribal Court and the Fort Peck Tribal Court so I could devote my time to raising four children. During this time period I also sat on the boards of the Missoula Indian Center, Mountain Home Montana, and the DeSmet School Parent-Teacher Organization (DSBC).

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

Currently, the majority of my practice involves representing parents and children in dependency and neglect proceedings at both the district court and appellate levels. These are complex cases involving issues of constitutional law, elaborate statutory schemes, and which often intersect with parents' companion criminal cases, mental health and chemical dependency treatment matters, and numerous other human issues. These cases require coordination with parties, counsel, witnesses, families, and agencies in various counties, states and reservations, and require me to work with a broad range of clients with physical, mental, and monetary difficulties.

I also represent parents in parenting plan actions and other custody and guardianship disputes under the Uniform Child Custody Jurisdiction and Enforcement Act, and parties defending against orders of protection. I also do work in the areas of tort claims and 1983 litigation, and other civil matters involving banking regulations and privacy issues.

Over the past nine years I have also sat as substitute Justice of the Peace for Missoula County, Department 1; sat on the Appellate Court of the Fort Belknap Tribe; sat as Special Judge on the Tribal Court of the Confederated Salish and Kootenai Tribes; and sat as Special Master and Settlement Master on cases assigned by the Fourth Judicial District Court. In these judicial capacities I heard and decided cases involving complex jurisdictional questions, thorny and politically sensitive criminal matters, and complicated civil matters.

General Civil Litigation: 50%

Appellate Practice: 50%

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

From 1994-2004 I practiced federal Indian law before the United States Supreme Court and multiple federal district courts and courts of appeals. I also developed and directed the Tribal Supreme Court Project, a national project to coordinate and improve Indian advocacy before the United States Supreme Court and served as the firm's law clerk director. My practice areas included:

- Appellate litigation, involving extensive Supreme Court and Circuit Court of Appeals brief writing, and Circuit Court oral argument
- Education
- Land Issues
- Water Rights
- Tribal Sovereignty
- Tribal jurisdiction
- Breach of Trust
- Employment
- Taxation

My practice included representation of Montana tribes, including assisting the Fort Peck Assiniboiné and Sioux Tribes in developing an education code, and the Chippewa Cree Tribe of Rocky Boys Reservation in their water rights settlement.

From 2004-2005 I served as the Acting Director of the Indian Law Clinic and Visiting Associate Professor at the Alexander Blewett III, School of Law. While there, I taught courses on Federal Indian and tribal law, and supervised students in the practice of Indian and family law in the Confederated Salish and Kootenai Tribal Court, the Montana Fourth Judicial District Court, the Montana Supreme Court, and the Eighth Circuit Court of Appeals.

16. If you specialize in any field of law, what is your specialty?

I specialize in the areas of dependency and neglect, domestic relations, the Indian Child Welfare Act, and other areas of Indian law (see list in question 15 above).

17. Do you regularly appear in court? Yes.

What percentage of your appearance in the last five years was in:

Federal court	0 %
State or local courts of record	100 %
Administrative bodies	0 %

18. During the last five years, what percentage of your practice has been trial practice?

40% of my practice has involved contested proceedings in the dependency and neglect, and domestic relations context, which are proceedings similar to bench trials.

19. How frequently have you appeared in court?

15 times per month on average.

20. How frequently have you appeared at administrative hearings?

Currently, 0 times per month on average.
Over my career I have appeared at fewer than 5 administrative hearings

21. What percentage of your practice involving litigation has been:

Acting as practitioner:
Civil: 95%
Criminal: 5%

Acting as Justice of the Peace or Special Judge:
Civil: 50%
Criminal: 50%

22. Have you appeared before the Montana Supreme Court within the last five years? If so, state the number and types of matters handled. Include the case caption, case citation (if any), and names, addresses and phone numbers of all opposing counsel for the five most recent cases.

In the past five years I have handled 20 appeals, and one Writ of Certiorari, in the Montana Supreme Court.

Matters have involved jurisdiction, termination of parental rights in dependency and neglect actions, private adoptions, the Indian Child Welfare Act, and matters involving guardianships and parenting plans.

Three of the matters were classified for *en banc* review, and seven, to date, have resulted in published opinions. One appeal was dismissed following my filing of an Anders Brief.

Five of my cases are currently awaiting decision by the Montana Supreme Court.

Five most recently concluded cases:

- *In re X.M.*, 2018 MT 264. Represented Mother/Appellant in a termination of parental rights case affirming the decision below.

Representing Appellee: Timothy C. Fox, Montana Attorney General
Tammy Plubell, Assistant Attorney General
215 North Sanders, P.O. Box 201401
Helena, MT 59620
(406) 444-2026

- *In re A.J.C.*, 2018 MT 234. Represented Father/Appellant in a unanimous *en banc* reversal and remand in favor of my client in a dependency and neglect action.

Representing Appellee: Timothy C. Fox, Montana Attorney General
Katie F. Schulz, Assistant Attorney General
215 North Sanders, P.O. Box 201401
Helena, MT 59620
(406) 444-2026

- *Cromwell v. Schaeffer*, 2018 MT 235. Represented Father/Appellant in a unanimous *en banc* reversal and remand in favor of my client in a parental interest, parenting plan action.

Representing Appellee: Jean Adele Carter
P.O. Box 1533
Thompson Falls, MT 59873
(406) 827-4311

Representing Appellee
(Child): Julie Brown
Montana Legal Justice
521 N. Orange, Missoula, MT 59802
(406) 356-6546

- *In re A.R.N.*, represented Father/Appellant, 2017 MT 133N, in a termination of parental rights case affirming decision below.

Representing Appellee: Timothy C. Fox, Montana Attorney General
C. Mark Fowler, Appellate Bureau Chief
215 North Sanders, P.O. Box 201401
Helena, MT 59620
(406) 444-2026

- *In re N.P.-S.*, represented Father/Appellant, 2017 MT 105N, in a termination of parental rights case affirming decision below.

Representing Appellee: Timothy C. Fox, Montana Attorney General
Mardell Ployhar, Assistant Attorney General
215 North Sanders, P.O. Box 201401
Helena, MT 59620
(406) 444-2026

23. State the number of jury trials that you have tried to conclusion in the last ten years. 0

While I have not litigated a jury trial, over the past two months I have been sitting in on several jury trials to learn how they are conducted, including a two-week homicide trial, and have met with numerous judges to discuss strategies and preparation for such trials. I have learned that while the structure and principles underlying the trials are similar, and that advance preparation, including addressing evidentiary matters, exhibits, and jury instructions beforehand, can make a trial run more smoothly and efficiently. I have also learned that every case has its own individual personality, and that a judge must be prepared for the unexpected, skills which must similarly be displayed in bench trials and other contested proceedings, proceedings in which I have considerable experience.

24. State the number of non-jury trials that you have tried in the last ten years. 48.

Dependency and neglect cases are not disposed of by trial but are conducted through a series of contested hearings regarding the initial removal of a child, the adjudication of a child as a youth in need of care, the appropriate disposition following adjudication, and placement of a child following removal. These cases are either dismissed following the return of the child to his or her parents, or are concluded by termination of parental rights following either a contested termination hearing, or a relinquishment of parental rights. I have represented numerous clients throughout multiple contested proceedings, which are analogous to bench trials, at each of these phases of litigation. I have also represented clients in contested guardianship proceedings, jurisdictional challenges, parenting plan actions, and contested hearings involving orders of protection, and awards of attorney's fees.

In addition, given the number of days I am in court, and the structure of the dockets, I have spent hundreds of hours observing other civil and criminal proceedings, and have learned how they are conducted. As my practice has not normally involved matters involving complex financial matters, in order to better prepare myself for such trials, I recently sat through a two-day bench trial involving such matters.

25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, provide the same information regarding opposing counsel and the nature of the matter.

The type of cases I currently handle go on for years and are made up of multiple contested proceedings, which are similar to bench trials.

Cases I have litigated in contested proceedings are listed in below:

- DN-19-29, *In re S.C.-C.*, represent Indian Guardian in a dependency and neglect action
- DN-19-32, *In re M.C.*, represent Mother in a dependency and neglect action
- DN-19-33, *In re J.C.*, represent Mother in a dependency and neglect action
- DN-19-34, *In re C.C.*, represent Mother in a dependency and neglect action
- DN-19-24, *In re D.G.*, represent Father in a dependency and neglect action

Opposing Counsel: Jessica Finley, Deputy County Attorney
200 W. Broadway, Missoula, MT 59801
(406) 258-4779

Presiding Judge: Shane Vanetta, Fourth Judicial District
(406) 258-4765

Standing Master: Amy Rubin, Fourth Judicial District
(406) 258-4765

- DN-17-20, *In re A.L.*, represent Mother in a dependency and neglect action
- DN-18-48, *In re K.W.*, represent Father in a dependency and neglect action
- DN-19-05, *In re N.B.*, represent Father in a dependency and neglect action
- DN-17-06, *In re B.W.*, represent Child in a dependency and neglect action
- DN-17-07, *In re B.W.*, represent Child in a dependency and neglect action
- DN-17-08, *In re B.W.*, represent Child in a dependency and neglect action

Opposing counsel: Howard Recht, Deputy County Attorney
205 Bedford St., Hamilton, MT 59840
(406) 375-6750

Presiding Judge: Jennifer B. Lint, Twenty-First Judicial District
(406) 375-6790

- DN-18-16, *In re R.T.*, represent Father in a dependency and neglect action
- DN-16-29, *In re G.C.*, represented Father in a dependency and neglect action

Opposing counsel: Benjamin Anciaux, Deputy County Attorney
106 Fourth Ave., Polson, MT 59860
(406) 883-7245

Presiding Judge: Deborah Kim Christopher, Twentieth Judicial District
(406) 883-7250

- DN-16-26, *In re C.D.*, represent Mother in a dependency and neglect action

Opposing counsel: Benjamin Anciaux, Deputy County Attorney
106 4th Ave., Polson, MT 59860
(406) 883-7245

Presiding Judge: James Manley, Twentieth Judicial District
(406) 883-7250

- DN-19-17, *In re K.H.*, represent Child in a dependency and neglect action
- DN-13-72, *In re M.C.*, represent Father in a dependency and neglect action
- DN-18-33, *In re K.L.*, represent Child in a dependency and neglect action
- DN-18-46, *In re B.L.*, represented Father in a dependency and neglect action
- DN-17-62, *In re A.M.*, represent Father in a dependency and neglect action
- DN-16-138, *In re S.B.*, represent Mother in a dependency and neglect action
- DN-16-132, *In re K.H.*, represented Child in a dependency and neglect action
- DN-16-30, *In re A.T.*, represented Mother in a dependency and neglect action
- DN-18-45, *In re M.L.*, represented Father in a dependency and neglect action

Opposing counsel: Kelly Henkel, Deputy County Attorney
200 W. Broadway, Missoula, MT 59802
(406) 258-4842

Presiding Judge: Robert L. Deschamps, III, Fourth Judicial District,
(406) 258-4772

Special Master: Charlotte Beatty
(406) 258-4772

- DN-17-75, *In re Y.H.*, represented Mother in a dependency and neglect action
- DN-16-136, *In re M.G.*, represent Mother in a dependency and neglect action
- DN-16-135, *In re L.G.*, represent Mother in a dependency and neglect action

Opposing counsel: Diane Conner, Deputy County Attorney
200 W. Broadway, Missoula, MT 59802
(406) 258-4842

Presiding Judge: Special Master Brenda Desmond, Fourth Judicial District
(406) 258-4778

- DN-18-35, *In re M.B.*, represent Father in a dependency and neglect action
- DN-18-16, *In re K.L.*, represent Mother in a dependency and neglect action

Opposing counsel: Jessica Finley, Deputy County Attorney
200 W. Broadway, Missoula, MT 59802
(406) 258-4842

Presiding Judge: Special Master Brenda Desmond, Fourth Judicial District
(406) 258-4778

- DN-18-30, *In re S.E.*, represented Father in a dependency and neglect action
- DN-17-135, *In re G.B.*, represented Mother in a dependency and neglect action
- DN-17-131, *In re R.B.*, represent Mother in a dependency and neglect action
- DN-16-148, *In re N.W.*, represent Father in a dependency and neglect action

Opposing counsel: Kelly Henkel, Deputy County Attorney
200 W. Broadway, Missoula, MT 59802
(406) 258-4842

Presiding Judge: Special Master Brenda Desmond, Fourth Judicial District
(406) 258-4778

- DN-18-64, *In re T.H.*, represent Mother in a dependency and neglect action
- DN-17-33, *In re C.H.*, represent Mother in a dependency and neglect action
- DN-17-32, *In re M.H.*, represent Mother in a dependency and neglect action
- DN-16-128, *In re A.M.*, represent Father in a dependency and neglect action

Opposing counsel: Amber Henning, Deputy County Attorney
200 W. Broadway, Missoula, MT 59802
(406) 258-4842

Presiding Judge: Leslie Halligan, Fourth Judicial District
(406) 258-4771

- DN-18-21, *In re D.G.*, represent Mother in a dependency and neglect action
- DN-18-22, *In re J.Q.*, represent Mother in a dependency and neglect action

Opposing Counsel: Karen Kane, Assistant Attorney General
Child Protection Unit
2677 Palmer, Suite 300, Missoula, MT 59808
(406) 329-1564

Presiding Judge: Leslie Halligan, Fourth Judicial District
(406) 258-4771

- DN-16-26, *In re C.D.*, represent Mother in a dependency and neglect action
- DN-18-12, *In re A.R.*, represented Mother in a dependency and neglect action
- DN-18-13, *In re A.R.*, represented Mother in a dependency and neglect action

Opposing counsel: Howard Recht, Deputy County Attorney
205 Bedford St., Hamilton, MT 59840
(406) 375-6750

Presiding Judges: James A. Haynes, Twenty-First Judicial District (retired)
Jennifer B. Lint, Twenty-First Judicial District
(406) 375-6780

- DN-18-08, *In re N.G.*, represented Mother in a dependency and neglect action
- DN-18-09, *In re A.E.*, represented Mother in a dependency and neglect action
- DN-18-10, *In re J.M.*, represented Mother in a dependency and neglect action
- DN-18-11, *In re V.M.*, represented Mother in a dependency and neglect action

Opposing counsel: Meghann Paddock, Deputy County Attorney
205 Bedford St., Hamilton, MT 59840
(No longer with the County Attorney's Office)

Presiding Judges: James A. Haynes, Twenty-First Judicial District (retired)
Jennifer B. Lint, Twenty-First Judicial District
(406) 375-6780

- DN-18-02, *In re A.M.*, represented Mother in a dependency and neglect action
- DN-17-22, *In re S.M.*, represented Father in a dependency and neglect action

Opposing counsel: Howard Recht, Deputy County Attorney
205 Bedford St., Hamilton, MT 59840
(406) 375-6750

Presiding Judge: Jeffrey H. Langton, Twenty-First Judicial District (retired)

- DN-17-23, *In re A.F.*, represent Mother in a dependency and neglect action
- DN-17-22, *In re D.F.*, represent Mother in a dependency and neglect action
- DN-17-21, *In re T.F.*, represent Mother in a dependency and neglect action
- DN-17-05, *In re C.H.*, represent Father in a dependency and neglect action
- DN-16-159, *In re A.B.*, represent Father in a dependency and neglect action
- DN-16-143, *In re E.L.*, represented Father in a dependency and neglect action

Opposing counsel: Diane Conner, Deputy County Attorney
200 W. Broadway, Missoula, MT 59802
(406) 258-4842

Presiding Judge: John W. Larson, Fourth Judicial District
(406) 258-4773

- DN-18-03, *In re C.C.*, represent Mother in a dependency and neglect action
- DN-18-07, *In re R.T.*, represent Child in a dependency and neglect action
- DN-18-08, *In re E.T.*, represent Child in a dependency and neglect action

Opposing Counsel: Ellen Donahue, Mineral County Attorney
300 River St., Superior, MT 59872
(406) 822-3535

Presiding Judge: John W. Larson, Fourth Judicial District
(406) 258-4773

- DN-19-06, *In re N.D.*, represent Father in a dependency and neglect action
- DN-19-07, *In re B.D.*, represent Father in a dependency and neglect action
- DN-18-03, *In re E.C.*, represent Mother in a dependency and neglect action
- DN-18-02, *In re G.J.*, represent Mother in a dependency and neglect action
- DN-17-162, *In re W.C.*, represent Mother in a dependency and neglect action
- DN-17-161, *In re A.H.*, represent Mother in a dependency and neglect action
- DN-17-16, *In re K.M.*, represented Father in a dependency and neglect action
- DN-17-04, *In re C.L.*, represent Mother in a dependency and neglect action

Opposing Counsel: Jessica Finley, Deputy County Attorney
200 W. Broadway, Missoula, MT 59802
(406) 258-4842

Presiding Judge: John W. Larson, Fourth Judicial District
(406) 258-4773

- DN-16-170, *In re K.O.*, represent Father in a dependency and neglect action
- DN-16-169, *In re J.O.*, represent Father in a dependency and neglect action

Opposing Counsel: Kelly Henkel, Deputy County Attorney
200 W. Broadway, Missoula, MT 59802
(406) 258-4842

Presiding Judge: John W. Larson, Fourth Judicial District
(406) 258-4773

- DR-17-26, *Lowe v. Parker*, represented Father in a parenting plan action

Opposing counsel: Jona Lagerstrom, Office of the Public Defender
610 Woody St., Missoula MT 59802
(No longer with Public Defender's Office)

Presiding Judge: John W. Larson, Fourth Judicial District
(406) 258-4773

- DN-14-06, *In re A.J.C.*, represented Father in a dependency and neglect action

Opposing Counsel: Bradley F. Custer, Assistant Attorney General
Child Protection Unit
121 Financial Dr., Suite C., Kalispell, MT 59901
(406) 751-2493

Presiding Judge: James Manley, Twentieth Judicial District
(406) 883-7250

- DR-14-71, *Cromwell v. Schaeffer*, represented Father in a parental interest and parenting plan action

Opposing counsel: Jean Adele Carter
P.O. Box 1533, Thompson Falls, MT 59873
(406) 827-4331

Presiding Judge: James Manley, Twentieth Judicial District
(406) 883-7250

- DN-16-10, *In re T.D.*, represented Child in a dependency and neglect action
- DN-16-11, *In re C.D.*, represented Child in a dependency and neglect action
- DN-17-06, *In re K.S.*, represented Child in a dependency and neglect action

Opposing counsel: Ellen Donahue, Mineral County Attorney
300 River St., Superior, MT 59872
(406) 822-3535

Presiding Judge: Karen Townsend, Fourth Judicial District
(406) 258-4774

- DN-17-61, *In re C.H.*, represent Father in a dependency and neglect action
- DN-17-60, *In re P.H.*, represent Father in a dependency and neglect action

Opposing Counsel: Jessica Finley, Deputy County Attorney
200 W. Broadway, Missoula, MT 59802
(406) 258-4842

Presiding Judge: Karen Townsend, Fourth Judicial District
(406) 258-4774

- DN-17-163, *In re B.B.*, represent Father in a dependency and neglect action
- DN-17-112, *In re L.E.*, represent Father in a dependency and neglect action
- DN-17-78, *In re D.F.*, represented Father in a dependency and neglect action

Opposing Counsel: Diane Conner, Deputy County Attorney
200 W. Broadway, Missoula, MT 59802
(406) 258-4842

Presiding Judge: Karen Townsend, Fourth Judicial District
(406) 258-4774

- DR-18-492, *Yeaman v. Thomas*, represented Father in an order of protection action

Opposing counsel: Kathleen Molsberry, Lowy Law, P.L.L.C.
2419 Mullan Rd., Suite B, Missoula, MT 59808
(406) 926-6500

Presiding Judge: Robert L. Deschamps, III, Fourth Judicial District
(406) 258-4772

- DG-17-97, *In re R.M.S.T.*, represented Father in a guardianship action and for attorney's fees
- DG-17-96, *In re R.J.T.*, represented Father in a guardianship action and for attorney's fees

Opposing counsel: Kimberly Dudik, Dudik Law, 1917 S. Higgins, Missoula, MT 59801
Matthew B. Lowy, Lowy Law, P.L.L.C.
2419 Mullan Rd., Suite B., Missoula, MT 59808
(406) 926-6500

Presiding Judge: Robert L. Deschamps, III, Fourth Judicial District
(406) 258-4772

- DR-18-493, *Yeaman v. Thomas*, represent Father in a parenting plan action

Opposing counsel: none, petitioner *pro se*

Presiding Judge: Robert L. Deschamps, III, Fourth Judicial District
(406) 258-4772

26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

I presided over a grievance hearing brought by an employee of the Missoula Indian Center in 2012.

27. If you have published any legal books or articles, other than Law Review articles, list them, giving citations, dates, and topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, state the topic, date, and group to which you spoke.

Articles: Other than law review articles, my writings have included:

- *Where Have Ethics and the Trust Gone for Indians? The Water Rights Example*, Federal Bar Association, Indian Law Conference Materials (2001)
- *Vigilance through the Tribal Supreme Court Project* (with John Dossett), INDIAN COUNTRY TODAY, June 18, 2003

Selected presentations:

- Montana Judges Conference, *Indian Child Welfare Act*, September 30, 2004
- Montana Law Review Children and the Law Symposium, *American Indian Education*, September 23, 2004
- Stanford Law School, *Indians Stand United Before the United States Supreme Court*, April 1, 2004
- Co-Chair, Federal Bar Association, 28th Annual Federal Indian Law Conference, *Tribal Self-Determination and the Federal Trust Responsibility: Collaboration or Conflict?*, April 10-11, 2003
- Yale Law School, Rebellious Lawyering Conference, *Fiduciary Duties in Federal Indian Law*, February 23, 2003
- New England School of Law, Symposium, *The Role of Jurisdiction in the Quest for Sovereignty*, October 25, 2002
- Co-Chair, Federal Bar Association, 27th Annual Federal Indian Law Conference, *Reaffirming Tribal Sovereignty in an Era of Judicial Activism*, April 3-4, 2002
- Western States Water Council & Native American Rights Fund, Symposium, *Settlement of Indian Reserved Water Rights Claims: Tule River Tribe*, October 10-12, 2001
- Federal Bar Association, 26th Annual Indian Law Conference, *Ethics Panel*, April 5-6, 2001
- Keynote Speaker, North Dakota School of Law, Conference, *Tribal Trust Communications and FOIA: Klamath Water Users Protective Association v. United States*, April 3, 2001
- Council for Tribal Employment Rights Annual Conference, *Indian Preference and Trends in Tribal Employment Law*, June 9, 1999
- National Lawyers' Guild Annual Conference, *State Taxation within Indian Country*, April 17, 1999
- Stanford Law School, Speaker Series, *The Past 25 Years of Federal Indian Law*, December 4, 1995
- Keynote Speaker, International Women's Week, *How General Principles of Federal Indian Law Intersect with Issues Impacting Women*, March 5, 1995

D. PROFESSIONAL AND PUBLIC SERVICE

28. List all bar associations and legal professional societies of which you are a member. Provide the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.
- State Bar of Montana, 2004-present
 - National Native American Bar Association, 2018-present
 - Western Montana Bar Association, 2019-present
29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. State the title and date of any office that you have held in each organization. If you held any offices, describe briefly your activities in the organization.

DeSmet School Booster Club (DSBC) Board, Board President, 2012-2016. The DSBC is a non-profit organization created to provide resources and programs to the students at the DeSmet School. As President, I assisted in securing 501(c) (3) status for the organization and for changing the organization to create a board of directors. I also ran the monthly meetings, conducted yearly mission planning for the organization, wrote grants for programs, organized and supervised events for the students, participated in fundraising, and assisted in determining the distribution of funds to benefit the students.

Mountain Home Montana Board of Directors, Board Member/Member of Personnel and Grievance Committee, 2013-2015. Mountain Home Montana provides shelter and support services for young mothers to enable them to reach a place of stable mental health and financial security so that they are able to provide safe and nurturing homes for their children. As a member of the Governing Board and member of the Personnel and Grievance Committee, I participated in monthly and special meetings to oversee the operations of the organization, worked with the Executive Director, and ultimately participated in investigations into and corrections of those operations.

Missoula Indian Center Board of Directors, Secretary /Board Member/ Chair of the Personnel and Grievance Committee, 2010-2012. As member of the Governing Board I participated in monthly and special meetings to oversee the operations of the organization and ultimately participated in investigations into and corrections of those operations. As Secretary, I was responsible for the minutes of the meetings. As Chair of the Personnel and Grievance committee I participated in the hiring of the Executive Director, and chaired grievance hearings requested by personnel.

30. Have you ever run for or held public office? If so, provide the details.

I have never run for or held public office. I applied for appointment as the fifth District Court Judge for the Fourth Judicial District in 2018.

31. Explain your philosophy of public involvement and practice of giving your time to community service.

Serving my community means a lot to me. I believe that if you are in a position to help others, you should.

I have dedicated my career to representing the under-privileged. Beginning in law school I knew my path was for destined for public service. I applied for and was granted a Skadden Fellowship, which allowed me to represent under-served tribes and members of Indian communities in fighting for their sovereignty and basic necessities such as water and quality education. I continued to represent tribes and tribal members as a Senior Staff Attorney at the Native American Rights Fund (NARF) for the remainder of the decade.

During this time I also trained for and volunteered on the local rape crisis hotline. I also served two terms as the Co-Chair of the Federal Bar Association Annual Federal Indian Law Conference; served as Vice President of the Colorado Indian Bar Association; served as a Board Member on the Indian Law Clinic Advisory Board at the University of Colorado at Boulder Law School; served as a Board Member on the Natural Resources Law Center Advisory Board, University of Colorado at Boulder Law School; and served as a Board Member on the Board of the Colorado Bar Association, Young Lawyers Division.

Immediately after moving to Montana I served the public through my work at the Alexander Blewett, III School of Law, where I taught students how to represent the under-privileged and to fight for other basic civil rights, such as the right to vote. While at the law school, I organized the Montana component of a national native voting rights project during which students and I traveled throughout the State to ensure that no voter was turned away at the polls.

I now work primarily with families struggling with addiction, poor parenting skills, poverty, mental illness, and lack of education. I advocate for them and assist them in navigating the legal system and in obtaining the skills and tools necessary to overcome their obstacles so they may become nurturing parents able to provide safe homes which allow their families to remain together.

As I have four school aged children, my primary community is the school community. Since 2011, when my first child entered school, I have been a continuous and active volunteer in the school setting. I immediately joined the DSBC, the DeSmet School parent-teacher organization, and quickly became president of that organization. I assisted in raising money and began organizing extracurricular events to benefit the students. While the school's own extracurricular programs were diminishing, I led the DSBC to bring after-school programs and activities to the school, brought school-wide programs and assemblies to the school, rehabilitated the playground, provided teachers meals and gifts during teacher appreciation weeks, and donated much needed books, equipment and supplies for student use. Although my children changed schools, I have continued to volunteer for the DeSmet Elementary school by assisting in fundraising activities to benefit the school.

After my children changed schools to St. Joseph Elementary and Middle School, I continued to be involved by volunteering at school sporting and extracurricular events, providing canned and baked goods to events and service projects, and developing and running an after-school reading club. I also volunteered for both the Girl Scouts and Boy Scouts. My volunteer efforts in these regards continue to this day and I do not expect I will ever stop being an active participant and volunteer to my community.

I have also volunteered by serving on the boards of Mountain Home Montana and the Missoula Indian Center, and am passing the importance of volunteer work to my children, who have joined me in volunteering at the Missoula Food Bank.

E. PROFESSIONAL CONDUCT AND ETHICS

32. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.

No.

33. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.

No.

34. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

No.

35. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, provide the details.

No.

36. Is there any circumstance or event in your personal or professional life that would, if brought to the attention of the Commission, Governor or Montana Supreme Court, affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

No.

F. BUSINESS AND FINANCIAL INFORMATION

37. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, provide the details, including dates.

- **Substitute Justice of the Peace**, Missoula, MT
2017-2018
- **Special Master/Settlement Master for Fourth Judicial District Court**, Missoula, MT
2016-2018
- **Appellate Judge, Fort Belknap Tribal Court of Appeals**, Harlem, MT
2016-2018
- **Judge Pro Tempore, Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation**, Pablo, MT
2010-2018
- **Special Judge, Fort Peck Tribal Court**, Poplar, MT
2013-2014

38. If you are an officer, director, or otherwise engaged in the management of any business, provide the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.

I am not an officer, director, or otherwise engaged in the management of any business, other than as owner of my private practice, Tracy Labin Rhodes, P.L.L.C. I would resign my position, as required.

39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, identify the source and the approximate percentage of your total income it constituted over the last five years.

I have received compensation for my role as Justice or Judge on the courts listed above from Missoula County, the Fort Belknap Indian Community, the Confederated Salish and Kootenai Tribes, and the Fort Peck Assiniboiné and Sioux Tribes. In my role as Settlement Master and Special Master, I was paid directly by the following law firms: Terrazas, Clark, Henkel, PC; Browning, Kaleczyc, Berry & Hoven, PC; Boone Karlberg, PC; and Henning, Keedy & Lee. The percentage of income from these sources varied over the past five years as my income from the practice of law grew. Over the years, the percentage of my income from these sources was approximately 20%.

40. Do you have any personal relationships, financial interests, investments or retainers that might conflict with the performance of your judicial duties or that in any manner or for any reason might embarrass you? If so, please explain.

I am in the process of a divorce. I have retained Kyle Cunningham as counsel to represent me in these proceedings. My husband has retained David Cottner to represent

him. At minimum, during the pendency of these proceedings, the Montana Code of Judicial Conduct, Rule 2.12 (A) (1) would disqualify me from presiding over matters involving these attorneys.

41. If appointed by the Governor, are you prepared to disclose the information required under 2-2-106, MCA (i.e., the name, address and type of your business; any present or past employer from which you currently receive benefits; any business or professional entity or trust in which you hold an interest; any entity in which you are an officer or director; and any real property, other than a personal residence, in which you hold an interest)?

Yes.

42. Have you filed appropriate tax returns as required by federal, state, local and other government authorities?

Yes.

43. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?

No.

44. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, provide the details.

No.

G. WRITING SKILLS

45. In the last five years, explain the extent to which you have researched legal issues and drafted briefs. State if associates or others have generally performed your research and the writing of briefs.

In the past five years I have performed extensive legal research and writing. I have filed more than 30 briefs with the Montana Supreme Court including opening briefs, reply briefs, petitions for rehearing, a Petition for a Writ of Certiorari, and three Anders briefs. I have also filed a multitude of briefs in various Montana District Courts. I perform all my own research and writing.

46. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., explain the type and extent of writing that you have done.

In the past five years I have drafted motions, proposed orders, and parenting plans in my role as attorney, and decisions/opinions/and orders in the cases over which I have presided as judge.

47. Attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable. The writing sample should be as recent as possible.

*Attached

48. What percentage of your practice for the last five years has involved research and legal writing?
65 %

49. Are you competent in the use of Westlaw and/or Lexis?

I am competent in both Westlaw and Lexis. I also use Fastcase and Google Scholar. I do all my legal research using electronic resources.

H. MISCELLANEOUS

50. Briefly describe your hobbies and other interests and activities.

My children have been, and continue to be, my primary outside interest. We are involved in scouting, church activities, soccer, baseball, volleyball, 4-H, gymnastics, and basketball. During the winter we downhill ski and ice skate. In the warmer months we hike, camp, and enjoy water activities like fishing, kayaking, paddle boarding, and swimming. We also try to see as much of Montana as we can, (as well as other places we can semi-comfortably get to in the car), where we enjoy National Parks, historical sites, historical re-creations like Bannack Days, museums, zoos, and aquariums.

My personal pastimes include reading (I'm mainly a fiction reader, with some non-fiction thrown in), cooking, whitewater kayaking, skiing, paintball, and now hockey. Last year I learned to play, and joined a women's hockey league.

Although it has slowed down considerably since having children, I am passionate about international travel. In my sophomore year of college I spent a year abroad in Angers, France, and traveled extensively throughout Europe that year. Since then, I have been to China, South Africa, Zimbabwe, Thailand, Mexico, and many islands in the Caribbean.

Fall is one of my favorite seasons, not the least reason being that it is football season. I was a trainer for the Notre Dame football team where I worked with health care professionals before, during, and after games and practices to provide preventative, emergency, and rehabilitative care to the players. While I no longer have sideline access, I continue to be an avid fan.

51. Describe the jobs that you have held during your lifetime.

In high school I was a lifeguard and office clerk at a law firm. During my college summers I continued in those jobs, and during the school year worked nearly full-time as for the Notre Dame athletic department as a trainer for the football team and for other varsity level sports.

During law school I interned for the Seneca Nation and the Native American Rights Fund.

Proud of my Native heritage as a member of the Lower Mohawk Band of Indians and a descendant of the Seneca Nation, I chose to maintain my commitment to protecting Indian rights by continuing my work for the Native American Rights Fund (NARF), first as a Skadden Fellow, and then as a full-time senior staff attorney. At NARF I practiced appellate advocacy before various circuit courts and the United States Supreme Court. My practice included extensive brief writing on issues including tribal sovereignty, the Indian trust doctrine, the exercise of tribal jurisdiction, and the limitation of state jurisdiction within Indian country. I also worked with tribes in securing water rights, including working on the Chippewa Cree-Montana water rights compact; developing and implementing tribal education codes, including the Fort Peck education code; establishing trust land, particularly defending challenges to taking land into trust, and holding the federal government accountable through breach of trust claims against the United States. I also worked on various other issues involving tax and employment law, and served as the firm's law clerk director. Finally, I developed and implemented the Tribal Supreme Court Project, a project designed to improve tribal advocacy before the United States Supreme Court through coordinated and more effective and specialized brief writing.

Immediately upon my arrival in Montana I worked at the Alexander Blewett, III School of Law as a visiting law professor and Interim Director of the Indian Law Clinic. There, I supervised students in the clinical practice of Indian and family law in Tribal Court, the Montana Fourth Judicial District Court, the Montana Supreme Court, and the Eighth Circuit Court of Appeals. I also taught the classroom component of the clinical program, and taught a course on Tribal Courts and Tribal Law. During my term at the law school, I also coordinated the Montana component of a national Native voting rights project, which was designed to ensure that Native voters were not disenfranchised.

Following my one-year appointment at the law school, I began my own private practice as a sole practitioner. In this role I continue to represent parties in civil matters, including representation of children and parents involved in dependency and neglect proceedings, parenting plan disputes, private adoptions, guardianships, Indian Child Welfare Act cases, and Treatment Court cases. I also have an extensive appellate practice representing parents appealing the termination of their parental rights and other parenting and child custody matters.

My Montana career has also involved my frequently having served as Substitute Justice of the Peace for Missoula County, Dept. 1, where I head a wide-ranging array of criminal and civil matters. I also sat as Special/Substitute Judge on the trial and appellate courts of several Montana Tribes, including the Confederated Salish and Kootenai Tribal Court, the Fort Belknap Appellate Court, and the Fort Peck Tribal Court. I am specifically called by tribes to sit on both civil and criminal cases of delicate political importance, including suits involving tribal officials or suits against the tribes themselves, and cases involving difficult issues of sovereignty and jurisdiction. I have also mediated and

decided parenting plan and discovery disputes in my role as Special Master/Settlement Master for the Fourth Judicial District.

In my job as mother, I devote my time to ensuring I am raising well-rounded, compassionate, respectful, and happy children. In this role I have more fully developed many important skills including patience, compassion, time management, conflict resolution, problem solving, and scheduling.

52. Identify the nature and extent of any pro bono work that you have personally performed during the last five years.

I have represented clients in parenting plan, guardianship, and appellate actions on a pro bono basis. I have also assisted parents on a pro bono basis during investigations by the Department of Health and Human Services, Child and Family Services Division prior to the parents' eligibility for assigned counsel. Last year I provided approximately 160 hours of pro bono services to indigent clients.

53. In the space provided, explain how and why any event or person has influenced the way that you view our system of justice.

As my application indicates, I do a substantial amount of work in dependency and neglect cases. Under Montana law, indigent parents in these cases are entitled to representation by assigned counsel. While children are also often appointed counsel, the law requires that a Court Appointed Special Advocate (CASA) be appointed as a Guardian Ad Litem to represent the child's best interests, and to submit reports to the Court containing recommendations regarding the child's welfare.

Late last year, during proceedings in which I represented a parent, the CASA on the case submitted a report to the Court, and to all the parties, in which she asserted that I had advised my client to lie to the Court—a criminal, and heinously unethical act. Although these charges were made against me, at no point prior to submission of this report, did the CASA ever contact me to investigate the truth of this allegation. Rather, I was blindsided by it. Then, immediately following the submission to the Court, and again with no investigation into the truth of the allegation, or any opportunity for me to defend myself, this report was also forwarded to the Judicial Nomination Commission—the body that had just recommended me to the Governor for consideration for appointment as a District Court Judge.

I felt like my twenty-five-year career, my life-long dream, and my reputation had been instantly shattered, all without my having had any forum or opportunity to defend myself. Although I have always maintained the highest ethical standards throughout my legal career, and although these charges were false, and easily proven so, I had been given no opportunity to prove so because I had been given no notice or opportunity to be heard.

I felt voiceless, and helpless.

Voiceless and helpless is not how our justice system should make us feel, however. Rather, individuals involved in our justice system should feel empowered and fairly treated, because our justice system provides us—indeed, guarantees us—due process, which at its most basic level, includes the right to notice and the opportunity to be heard prior to any judgement or decision about the matter being made.

I have always intellectually understood the importance of due process. And, in my practice, I vigorously and meaningfully argue, almost *ad nauseum*, that it must be afforded to my clients. However, not until this incident, have I ever “felt” the meaning of due process. In the days surrounding this incident, however, I felt the denial of due process to my core.

Although this incident was devastating at the time, it imprinted on me in a personal and powerful way the meaning and importance of a person’s right to be heard, and the reality that all sides need to be heard before truth, fairness, or justice can be reached. This experience will only serve to make me a better judge.

54. In the space provided, explain the qualities that you believe to be most important in a good district court judge.

I believe that the quality that is the most important for a district court judge is to understand and apply the law to the facts in an independent and impartial way. A judge should decide each case based solely on the merits of the case free from any prejudice or bias. Nevertheless, recognizing that human lives are affected by any judicial decision, a judge should impartially adjudicate with compassion, humility, and empathy.

A good district court judge should also possess excellent research and writing skills, should be highly skilled in legal analysis, should be patient and a good listener, and should be thorough and timely in the handling of each case before her.

In addition, a good judge should be composed on the bench, and have ability and temperament to communicate with counsel, unrepresented parties, jurors, witnesses, and the court staff in a calm and courteous manner.

A good district court judge should also be capable of making difficult decisions. In so doing, a judge should not rush to conclusion, but should keep an open mind until all the evidence, testimony, and legal arguments have been fully, and fairly presented. After ensuring that litigants have been afforded due process and fair proceedings, a judge should act decisively, should exercise good sense in making discretionary decisions, and should have the fortitude to stand by those decisions even in the face of controversy or criticism.

Finally, I a good judge should hold herself to the highest standards of personal and professional ethics, whether within or outside the courtroom.

55. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

Where there is direct precedent, it is the obligation of the trial court to apply that law, no matter how difficult the facts make that application, and irrespective of the judge's personal feelings about the correctness of the law as established by the legislature or interpreted by a higher court. Only with consistent application of the law can a judge insure that the public has confidence in our legal system.

Balanced against this application of precedent, however, is the understanding that direct application of the law is not always possible. For instance, cases may present issues of first impression, or involve matters that are left to the discretion of the trial court judge. In such instances, the district court judge needs to exercise good, reasoned judgment, and must determine what is right in a particular situation in order to ensure the most equitable and just outcome. In reaching this outcome, the judge should not be swayed by personal opinion, bias, political pressure, or by the income, race, gender, or any other non-relevant attribute, of the litigants.

56. In the space provided, state the reasons why you are seeking office as a district court judge.

I have always been called to serve, and to fight against injustice. I am seeking this position because it provides me the best opportunity to continue my public service and to guard against injustice in the most diverse and expansive way.

Although I have always relished in the practice of law and the representation of clients, sitting as a District Court Judge would allow me to use my skills and experience to serve our community to an even greater degree. Because the Fourth Judicial District is a large district, with a large docket, I would be reaching and serving a vast number of people. In my role as District Court Judge I would have the opportunity to provide people going through what are likely the most difficult events in their lives with a fair, calm, and just forum to reach resolution.

In addition, I am seeking the office of District Court Judge because I love the law. I am deeply interested in the nuances and complexity of the law, and am comforted by the direction and consistency the rule of law gives to difficult life situations. The office of District Court Judge would provide me the opportunity to delve into and address a multitude of legal issues ranging from important constitutional legal questions, complicated statutory and jurisprudential issues, as well as straightforward and narrow questions of fact and law—all of which interest and excite me.

I am also seeking this office because I think I would be particularly good at the job. I am knowledgeable, experienced, and dedicated to justice. I possess the qualities necessary for a good judge, and also have the professional and life experience that have groomed me to be a competent, fair, and learned one. I know that a District Court Judge is asked

every day to sit as sole arbiter, making difficult, emotional, life-changing decisions for people. As a sole practitioner and single mother of four, I address challenging life situations and make independent, weighty decisions affecting people's lives on a daily basis. I routinely take the difficult cases and clients that others eschew, and have shown that I have the stomach for the difficult work required of a District Court Judge. I have also shown that I can independently make the important decisions the job requires day after day, and year after year.

57. What items or events in your career have distinguished you or of which you are most proud?

One of the most notable accomplishments of my career was the development of the Tribal Supreme Court Project.

In the 2001 term, the United States Supreme Court rendered two opinions devastating to Indian law and longstanding principles of tribal sovereignty and jurisdiction. As devastating as they were, however, a review of two decades of cases showed that these two opinions only capped off what had been an 80% loss rate before the Supreme Court. In response, the Native American Rights Fund (NARF) and the National Congress of American Indians (NCAI) joined forces to create the Tribal Supreme Court Project (Project). The goal of the Project was to coordinate and strengthen the advocacy of Indian issues before the Supreme Court, to develop new litigation strategies, to coordinate tribal legal resources, and to ultimately improve tribes' win-loss record. The Project was housed at NARF and staffed solely by me.

Although tribes were not alone in developing an institutional structure to improve advocacy, (for instance, both the National Association of Attorneys General and the Defender Services Division Training Branch had already developed similar programs), the Tribal Supreme Court Project was the first time such a coordinated and structured effort had been attempted to improve Indian advocacy before the nation's highest tribunal. It was thus a Project built from the ground up.

Through the Project I established a working group of more than 200 noted attorneys and academics from around the nation who specialized in Indian law and other areas of law impacting Indian cases, including property law, trust law, and Supreme Court litigation. I assisted counsel with brief preparation and moot courts, monitored Indian cases in state and federal appellate courts that had the potential to reach the Supreme Court, assisted tribes in determining whether to seek Supreme Court review, and coordinated and wrote numerous amicus briefs on behalf of hundreds of tribes.

I am proud to say that following development of the Tribal Supreme Court Project, the win-loss rate before the Supreme Court did improve and that the Project successfully continues today.

Another career highlight and accomplishment of which I am particularly proud occurred last year. I had been representing a Father who had his child removed by the State in a dependency and neglect proceeding almost four years prior. Although the Father had

shown himself to be a fit and safe parent, eager and ready to take care of his child, and although he vigorously fought throughout the four-year period to do so, his child was not returned to him. Rather, the State placed the child with the Maternal Grandmother, following which the District Court granted the Grandmother permanent custody of the child in a simultaneous parenting plan action. Father was admonished to give up his fight, and vilified for not doing so. However, he persevered, and we appealed the two cases to the Montana Supreme Court. In September, 2018, the Montana Supreme Court unanimously decided in two *en banc* rulings—an astonishingly rare occurrence in dependency and neglect and parenting plan cases—that the State had unconstitutionally and improperly deprived this Father of his fundamental right to parent, and that the District Court erred in even entertaining Grandmother’s parenting plan action. (*In re A.J.C.*, 2018 MT 234, and in *Cromwell v. Schaeffer*, 2018 MT 235.) Father was happily reunited with his son, and today they are thriving as a family.

58. Provide any pertinent information reflecting positively or adversely on you that you believe should be disclosed to the Judicial Nomination Commission.

I am a workhorse and a quick learner. As an appellate lawyer on dependency and neglect cases, I am required to read through thousands of pages of pleadings and transcripts, distill the important issues, research the applicable law, and write quality factual recitations and legal analyses in a short amount of time. Also, as a dependency and neglect practitioner who takes on a steady stream of new cases, in addition to taking over many cases after those cases have been going on for years, I am often required to do the same at the district court level. Similarly, in my work as a tribal appellate judge, I have been required to tackle cases with immense case files. These situations have required me to expertly and expeditiously handle an immense amount of work and have made me expert in distilling out important issues and producing work product thoroughly, accurately, and efficiently. Indeed, in the past two weeks alone, I have submitted more than a hundred pages of briefing, while simultaneously and effectively representing clients at daily hearings, settlement conferences, and treatment team meetings. I know that the position I seek will require me to step in immediately to address pending cases, and to handle the extremely heavy workload of a District Court Judge. I am well-prepared to do so.

I am also eager to learn, and have shown initiative when it comes to learning the skills necessary for this position. For instance, although I have not had experience in every area of the law, or with every type of judicial proceeding, such as jury trials, over the past several months, I have worked to cure those deficits by sitting-in and learning from jury and bench trials in which I am not involved, approaching judges and other attorneys to ask questions, and researching areas of law or process about which I am unfamiliar. This practice of seeking out advice and training will not end following my appointment. I will continue to improve my skills and knowledge, and I am confident that each time I take the bench, I will be prepared for any type of judicial proceeding over which I preside.

Also, as I know that within short order following appointment, maintaining the position of District Court Judge may require election, I have begun to prepare an election strategy.

I have identified both an experienced treasurer and a campaign advisor, have begun to develop a budget and plan for allocating funds for campaign activities, have developed promotional materials, have amassed a volunteer committee, and have secured at least one fundraiser.

59. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge applicant?

I have a unique, diverse and extensive background in the law and life which particularly suits me for service as a District Court Judge. I am well prepared for the work. I am frequently in the courtroom, and my practice involves the people and issues that the District Court faces daily. I will not have the dauntingly high learning curve usually facing a newly appointed judge, but am ready to knowledgeably and professionally do the work that will face me from my first day.

Cases involving the issues I am most familiar with, either directly or tangentially, dominate the District Court's docket. As work load studies and the most recent State of the Judiciary report show, a large proportion of the District Court case filings involve dependency and neglect, domestic relations, criminal, and treatment court cases—areas in which I have vast experience. And these numbers are rising. Dependency and neglect case filings alone have increased 350% since 2009. And, as case load studies conclude, the dependency and neglect cases are among the most time intensive for the District Court, and have the highest priority for attention.

Given my experience, I am also uniquely qualified to work with Native litigants, and issues involving Federal Indian Law. This qualification is important given the significant Native population in Montana, and the disproportionately high rates at which Native people find themselves involved in the judicial system. As research shows, statewide, Native parents are disproportionately involved in dependency and neglect cases, Native children make up a larger proportion of children in the foster care system, and Native people have both disproportionately high incarceration rates and victimization rates. However, as recent Montana case law shows, Indian law, particularly the Indian Child Welfare Act (ICWA), has been improperly applied in many Montana courts. In the past year alone, four cases, *In re L.D.*, 2018 MT 60, *In re D.E.*, 2018 MT 196, *In re L.A.G.*, 2018 MT 255, and *In re B.Y.*, 2018 MT 309, have been reversed by the Montana Supreme Court for district court error in applying ICWA in dependency and neglect actions. Given my extensive familiarity with Indian law in general, and the Indian Child Welfare Act, in particular, I would be particularly suited to ensure that the Fourth Judicial District maintains its high standards of ICWA compliance.

In an effort to ensure the goals of ICWA are successfully achieved in Missoula courts, over the past year, a working group has been formed to develop an "ICWA Court" in Missoula County. Yellowstone County and at least five other jurisdictions in the country have created such courts in an effort to improve implementation of ICWA. An ICWA court would not be separate from the Court as a whole, but would work to facilitate and improve communications with tribal courts and tribal child welfare departments, to

identify and engage appropriate tribal or culturally appropriate services, and to provide education surrounding the importance and proper application of ICWA. Given my background and experience, I would be highly suited to implement such a court in Missoula.

In addition to my interest in an ICWA court, I have a profound interest in being involved in the existing Family Drug Treatment Court and Veterans Court. While the adversarial model of our judicial system is suited for arriving at truth and justice in many circumstances, and incarceration may often be warranted in many cases to ensure the protection of our community, I believe that in other situations, a more holistic and team-like approach best meet the needs of individuals, families, and our community as a whole. The treatment and rehabilitation for those suffering from addiction and mental illness, at least in my mind, provides the best outcome for everyone. Indeed, as evidence shows, Family Drug Treatment Courts and Veterans Courts have been successful in reducing the rates of recidivism, improving the functioning of participants as contributing members of society, and reducing cost to taxpayers. I am also interested in participating in Youth Court in order to provide early intervention for young offenders.

My extensive experience working with indigent litigants and unrepresented parties, both as a practitioner and as judge, also make me particularly suited to serve as District Court Judge. My experience has given me a keen understanding of and ability to work effectively with indigent and unrepresented litigants, who like Native litigants, also make up a large proportion of individuals appearing in court. In addition, having four children of my own, and having worked for many years with child clients, I possess the important quality of knowing how to effectively listen to and communicate with children, who are also involved in many proceedings before the court.

I also have the unique perspective that has comes from doing defense work on behalf of individuals involved in actions brought by the State. This is a role that requires an ability to think and act creatively—another important requirement for a judge.

I am also uniquely suited for the role of District Court Judge given that, throughout my career, I have been a trial level attorney, an appellate attorney, and a judge. Active participation in the judicial system in each of these roles has given me a particularly deep and varied perspective of our system from every angle of the process. As an appellate attorney, I review entire records of cases and dissect them to determine whether the judge, in particular, made any legal errors, and whether there were any deficiencies in the proceedings. Having often found such errors and deficiencies, I am particularly aware of, and sensitive to, how errors can occur, and would be vigilant in ensuring similar errors are not repeated by me. As an attorney who has practiced before many judges in many jurisdictions, I have seen multiple judicial styles and have learned a fair amount about what styles would work best for me. And, having frequently sat as both a trial level and appellate judge in many different jurisdictions, I have learned how to quickly familiarize myself with different statutory schemes and procedural rules, and have shown that I can capably serve as a judge.


My experience as a sole practitioner, which has required me to single-handedly balance and juggle a heavy caseload touching on broad ranging areas of constitutional, civil, and criminal law, and which has required me to work with clients with mental disability, chemical dependency, and financial constraints, makes me particularly suited to sit in the position of a jurist on a court of general jurisdiction.

I am hard-working, energetic, have patience, a strong sense of fairness and humility, have strong decision-making and problem-solving skills, and an extensive and unique legal background. I bring the fullest complement of skills, experience, and character necessary to serve as District Court Judge for the Fourth Judicial District, and would diversify the bench in meaningful and important ways. I am ready for the weight and responsibility of this position.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 4th Judicial District, if tendered by the Governor, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.

May 11, 2019
(Date)


(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by 5:00pm on Thursday, May 30, 2019.

Mail the signed original to:

**Office of Court Administrator
c/o Lois Menzies
P.O. Box 203005
Helena, MT 59620-3005**

Send the electronic copy to: mtsupremecourt@mt.gov

TRACY LABIN RHODES WRITING SAMPLE

[Note: This is an excerpt from sections of the Opening and Reply briefs in In re A.A.G.G., Supreme Court No. DA 18-0612, currently awaiting decision by the Montana Supreme Court]

MONTANA CODE ANNOTATED § 41-3-110 IS UNCONSTITUTIONAL ON ITS FACE AS IT DOES NOT MEET THE MINIMUM REQUIREMENTS OF DUE PROCESS AND VIOLATES EQUAL PROTECTION

Section 41-3-110 provides:

A court may permit testimony by telephone, videoconference, or other audio or audiovisual means at any time in a proceeding pursuant to this chapter.

Mont. Code Ann. § 41-3-110.

The blanket permission for telephonic, videoconference, or other audio-visual testimony is permitted only under Mont. Code Ann. § 41-3-110 in abuse and neglect proceedings under Title 41 of the Montana Code. Under the Montana Rules of Evidence, other civil litigants are entitled to the right of confrontation and cross-examination contained in Mont. R. Evid. Rule 611 (e), which provides:

Confrontation. Except as otherwise provided by constitution, statute, these rules, or other rules applicable to the courts of this state, at the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.

Mont. R. Evid. Rule 611 (e).

The Montana Supreme Court has emphasized the importance of the right of confrontation under Rule 611 (e), and has assessed whether telephonic testimony sufficiently comports with the right of confrontation. *In re the Marriage of Bonamarte*, 263 Mont 170, 866 P.2d 1132 (1993). The sole issue addressed by the Court in *Bonamarte*, a dissolution case, was whether one party was properly allowed to testify by telephone where the other party objected to such telephonic testimony.

Bonamarte, 866 P.2d at 1133. The Court explained that:

Requiring a witness to testify personally at trial serves a number of important policies and purposes. A witness' personal appearance in court: (1) assists the trier of fact in

evaluating the witness' credibility by allowing his or her demeanor to be observed firsthand; (2) helps establish the identity of the witness; (3) impresses upon the witness, the seriousness of the occasion; (4) assures that the witness is not being coached or influenced during testimony; (5) assures that the witness is not referring to documents improperly; and (6) in cases where required, provides for the right of confrontation of witnesses.

Bonamarte, 866 P.2d at 1134 (citations omitted).

In describing the right of confrontation, the Court recognized that, “the right of confrontation long provided in all criminal cases, is also *required* in civil cases in Montana under Rule 611 (e).”

Bonamarte, 866 P.2d at 1134. Explaining the importance of the right to in person confrontation in civil cases, the Court cited *Coy v. Iowa*, 487 U.S. 1012, 1019-1020, 108 S.Ct. 2798, 2802, 101 L.Ed.2d 857, for the proposition that:

The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss—the right to cross-examine the accuser; both ensur[e] the integrity of the factfinding process.

Bonamarte, 866 P.2d at 1135.

As the Court explained, the principles behind the right to confront witnesses described in *Coy*, which was a criminal case, were equally as applicable in civil cases in Montana.

Bonamarte, 866 P.2d at 1135. The Court expounded that:

[t]he integrity of the factfinding process at trial is undermined where the parties do not have the opportunity to confront each other or the witnesses, where the finder of fact does not have the opportunity to observe the parties and the witnesses and where the opposing party cannot effectively cross-examine the other party or the witnesses.

Bonamarte, 866 P.2d at 1135. As the Court further explained:

If the phrase ‘a witness can be heard only in the presence and subject to the examination of all the parties . . .’ is to have any meaning . . . the witness must be physically present in the courtroom to testify personally at trial unless all parties and the court agree to a different method of examination which protects the parties’ rights of confrontation and cross-examination and, at the same time, allows the fact finder to assess the witness’ credibility, testimony, and the evidence presented.

Bonamarte, 866 P.2d at 1135.

In *Bonamarte*, the Court held that allowing telephonic testimony over objection was not an acceptable substitute to the party's personal appearance at trial, "particularly given the significance placed upon the right to confront witnesses in civil trials as set forth in Rule 611 (e)." *Bonamarte*, 866 P.2d at 1137. As the Court recognized, "[t]he opportunity to observe a witness is so critical to judicial control and effective cross-examination that its denial is manifestly prejudicial." *Bonamarte*, 866 P.2d at 1137 (citation omitted). Thus, in *Bonamarte*, the Court concluded that with only the telephonic appearance, and not the physical presence of one of the parties, the trial was not fair. *Bonamarte*, 866 P.2d at 1135.

Although the Court in *Bonamarte* indicated that it was not creating a *per se* rule precluding telephonic testimony, it indicated that for such telephonic testimony to be allowed, all parties would need to consent, or at least have sufficient notice to object or make alternative arrangements, and that the use of telephonic testimony would only be allowed only under special or exigent circumstances. *Bonamarte*, 866 P.2d at 1136.

As the Court has oft held, Article II, Section 17, the Montana Constitution provides that, "[n]o person shall be deprived of life, liberty, or property without due process of law." *In re K.F.G.*, 2001 MT 140, 306 Mont. 1, 29 P.3d 485. This right to due process includes the right of confrontation and cross examination, even in civil cases. *Bean v. Montana Bd. of Labor Appeals*, 1998 MT 222, ¶ 34-36, 290 Mont. 496, 965 P.2d 256. The Court has declared, "we have 'been zealous to protect these rights from erosion' not only in criminal cases but in civil and administrative cases as well.'" *Bean*, ¶ 32.

Under Montana law, that minimum requirements of due process include, "the opportunity to be heard in person," and "the right to confront and cross-examine adverse witnesses." *State v. Finley*, 276 Mont. 126, ¶ 31, 915 P.2d 208 (1996). *See also State v. Megard*, 2006 MT 84, ¶ 23, 332 Mont. 27, 134

P.3d 90 (Recognizing in a non-criminal trial that, “[o]ne of the minimum due process requirements is ‘the right to confront and cross-examine adverse witnesses.’”)

Like the Montana Supreme Court, the United States Supreme Court has also recognized the importance of, and indeed, the due process requirement, that civil litigants have the opportunity to confront and cross-examine adverse witnesses. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (holding that, “[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”) In describing the minimum due process rights in civil cases, “[t]he fundamental requisite of due process of law is the opportunity to be heard.” *Goldberg v. Kelly*, 397 U.S. at 267. This includes the right of the litigant to confront and cross examine adverse witnesses. *Goldberg*, 397 U.S. at 270. *See also Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (holding that minimum requirements of due process in non-criminal trials include “the right to confront and cross-examine adverse witnesses,” absent good cause.) As the United States Supreme Court has held, the elements of confrontation include, physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. *Maryland v. Craig*, 497 U.S. 836, 846, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). And, as the United States Supreme Court has also held, where a State’s law did not allow the litigants to appear personally to confront and cross examine, such “omissions are fatal to the constitutional adequacy of the procedures.” *Goldberg*, 397 U.S. at 268.

The United States Supreme Court has recognized that, while the right to in-person confrontation is not absolute, “that does not, of course, mean that it may easily be dispensed with.” *Craig*, 497 U.S. at 850. Rather, only “in certain narrow circumstances” and “occasionally,” may a court find that upon close examination of a particular case, competing interests and the necessities of the case may warrant dispensing with face-to face confrontation. *Craig*, 497 U.S. at 848.

Although this Court has upheld telephonic testimony, it has done so only on a case-by-case basis where special circumstances or good cause existed, and where the Court was satisfied that due process protections had been ensured. For instance, in *Megard*, the Court found that, under the “unique circumstances” of the case, good cause permitted a witness’ telephonic testimony where the district court had knowledge of the witness, corroborating testimony allowed the court to adequately assess the witness’ credibility, scheduling problems prevented the witness’ appearance, and any error was harmless. *Megard* at ¶¶ 19, 26, 28, 29, 30.

However, the opposite has also been true. For instance, *In re B.C.*, 283 Mont. 423, 942 P.2d 106, 109 (1997), the Court held that the circumstances which would allow telephonic testimony were not present because all parties did not consent, and there were no special or exigent circumstances dictating the necessity for telephonic testimony. Similarly, in *Taylor v. Taylor*, 272 Mont. 30, 899 P.2d 523 (1995), the Court held that substantial rights were prejudiced where an administrative law judge did not permit parties to participate “in person.”

Furthermore, the Court has drawn a distinction between telephonic testimony and video-conferencing testimony. In *City of Missoula v. Duane*, 2015 MT 232, 380 Mont. 290, 355 P.3d 729 the Court held:

We conclude that the Municipal Court did not abuse its discretion in allowing [a witness] to testify via Skype, and the District Court did not err in upholding that decision. The concerns underlying our decision in *Bonamarte* with respect to cross-examination by telephone simply do not exist in this case and with this technology. **While telephone testimony presents the listener with a disembodied voice and no clue as to the demeanor of the witness**, Skype allows the court and jury to observe and hear the testimony of the witness firsthand.

Duane, ¶ 20 (emphasis added).¹

¹ The Court further stated that:

The preferred method of introducing the testimony of a witness at trial is by way of the personal presence of the witness in the courtroom. However, where a moving party makes an adequate showing on the record that the personal presence of the witness is impossible or impracticable

As the United States Supreme Court has admonished, “[i]f anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.” *Santosky*, 455 U.S. at 753-54.

However, under Mont. Code Ann. § 41-3-110, a court need not conduct any analysis regarding the adequacy of the process due a parent regarding his right to personally confront and cross examine witnesses before depriving a parent of his fundamental and constitutionally protected right to the care and custody of his child. Rather, the statute gives a court the authority to automatically divest a parent his due process right to personally confront and cross examine the witnesses against him. This preemptive power is allowed even over the objection of a parent, without any assessment of whether credibility of the party or witness may be established, without any confirmation that the witness’ identity can be firmly established, without any assurance that the party or witness understands the seriousness of the occasion, without any assurance that the party or witness is not being coached or influenced during testimony, without any assurance that the party or witness has access to pertinent documents or is referring to documents properly, without any analysis of whether there are exigent circumstances, without any analysis as to whether good cause exists to infringe upon the parent’s right to confront and cross examine, and without any other inquiry into whether telephonic appearance would disadvantage a parent, or that it would ensure fundamentally fair procedures. Such unbridled

to secure due to considerations of distance or expense, a court may permit the testimony of the witness to be introduced via Skype or a substantially similar live 2-way video/audio conferencing program that satisfies the hallmarks of confrontation as herein set forth. Under the circumstances presented here, the District Court did not abuse its discretion in permitting the Skype testimony.

Duane, ¶¶ 21, 25.

and unchecked discretion violates a parent’s right to due process and makes § 41-3-110 invalid on its face.

Appellee argues that, “a party bringing a facial challenge must ‘establish that no set of circumstances exists under which the [statute] would be valid’—that is, that the law is unconstitutional in all of its applications.” (Appellee Br. at 25) (*citing Mont. Cannabis Indus. Ass’n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131; *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). Based on these judicial pronouncements, Appellee argues that Father’s facial challenge must fail.

While Appellee does correctly cite statements made by both this Court and the United States Supreme Court, these bald statements do not go far enough to answer whether Mont. Code Ann. § 41-3-110 is facially invalid. As indicated in both cases cited by Appellee, for the Court to determine whether a statute fails a facial challenge, the Court must conduct full and appropriate due process and equal protection analysis.

In *Salerno*, a case cited by Appellee, the United States Supreme Court was faced with an argument that the Bail Reform Act of 1984, an act which allowed courts to determine whether an arrestee would be detained without condition, was unconstitutional on its face. *Salerno*, 481 U.S. at 744. Before determining that the act was facially valid, the Court completed a due process analysis in which it examined the State’s interest, and ultimately determined that the State’s regulatory interest was legitimate, compelling, and “overwhelming.” *Salerno*, 481 U.S. at 747, 50. The Court then determined that the act was narrowly tailored to address the “particularly acute” problems the government was attempting to address, and did so with “extensive safeguards,” and “procedural protections.” *Salerno*, 481 U.S. at 752.

In assessing and describing the narrow tailoring, the Court explained that the Bail Reform Act did not give a judicial officer “unbridled discretion” in making detention determinations. *Salerno*, 481

U.S. at 742. Rather, the Court recognized that through the statute, Congress, “specified,” and made “careful delineation,” of the considerations relevant to detention decisions. *Salerno*, 481 U.S. at 742 751. The Court also recognized that the statute afforded the accused a full-blown adversarial hearing at which he had a right to counsel, had the right to testify, to call witnesses, and to cross-examine the state’s witnesses before the court could approve detention without condition. The Court also recognized that the statute required the state to establish the statutorily identified factors by clear and convincing evidence, required the court to issue written findings of fact, and provided the accused with a right to an immediate appeal of the court’s detention decision. *Salerno*, 481 U.S. at 742. The Court deemed that these statutory requirements provided, “extensive safeguards sufficient to repel a facial challenge.” *Salerno*, 481 U.S. at 752.

Likewise, in *Cannabis*, the second case cited by the Appellee, the Montana Supreme Court also did a full constitutional analysis in assessing the facial validity of a statute. In that case, the Court determined that the rights affected by the involved statute were not fundamental, and thus examined the challenged statutory provisions under a rational basis analysis to determine whether they served a legitimate objective, and whether the provisions were reasonably related to achieving those objectives. *Cannabis*, ¶ 30. Although the Court found that most of the challenged provisions did survive this rational basis analysis, it held one of the provisions facially unconstitutional on equal protection grounds given that the provision was not reasonable when balanced against the purpose of the challenged act. *Cannabis*, ¶¶ 55-56.

As both the Montana and United States Supreme Court have clearly determined, where a fundamental right is implicated, in determining whether a statute facially violates substantive due process under the Fourteenth Amendment to the United States Constitution, and Article II, section 17 of the Montana Constitution, strict scrutiny must be applied. *Malcomson v. Northwestern*, 2014 MT 242, ¶ 14, 376 Mont. 306, 339 P3d 1235 (where legislation infringes on a fundamental right it must be

reviewed under a strict scrutiny analysis). Under strict scrutiny, a statute must be justified by a compelling state interest and must be narrowly tailored to effectuate only that interest. *Malcomson*, ¶ 14. *In re S.M.*, 2017 MT 244, ¶ 17, 389 Mont. 28, 403 P.3d 324 (“If the purported right is fundamental, any governmental restriction must pass strict judicial scrutiny”). *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). As the United States Supreme Court has held, “the Fourteenth Amendment forbids the government to infringe . . . fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

Here, the right impinged by Mont. Code Ann. § 41-3-110, is the fundamental right to confrontation and cross examination. Thus, this statute must be justified by a compelling state interest, and must be narrowly tailored to effectuate only that interest. However, neither of these elements are met here.

Indeed, the Appellee has proffered no state interest justifying the enactment of Mont. Code Ann. § 41-3-110, and has offered no explanation as to how this statute is narrowly tailored to achieve a state interest. Even assuming *arguendo*, that the state may have an interest in expeditiously concluding cases involving abused or neglected children so as to effect permanency, or may have an interest in conserving state resources, those interests are insufficiently compelling to justify abridging a parent’s fundamental rights to fair process in abuse and neglect, and especially, termination proceedings. Also, even assuming *arguendo*, the validity of state interests, Mont. Code Ann. § 41-3-110 is not narrowly tailored to effectuate any possible purpose for the statute. This statute contains no parameters or limitations, but rather gives a court unbridled discretion to deprive a parent of the right to confront and cross-examine. Unbridled discretion is not narrow tailoring.

In addition to violating parents' due process rights, Mont. Code Ann. § 41-3-110 violates equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and Article II, Section 4 of the Montana Constitution. As this Court has explicitly held, for equal protection purposes, parents facing termination in proceedings brought by the state are similarly situated to parents facing termination in private proceedings. *In re Adoption of A.W.S.*, 2014 MT 322, ¶ 15, 377 Mont. 234, 339 P.3d 414. As the Court has further explicitly held, a parent's interest in one's child is a fundamental right, and statutes and procedures which implicate those fundamental rights require the Court to apply strict scrutiny in an equal protection analysis. *In re A.W.S.*, ¶ 16.

In applying the strict scrutiny standard, the Court determines whether the disparity in the current statutory framework is narrowly tailored to serve a compelling governmental interest. *In re A.W.S.*, ¶ 17. The burden to prove whether the statute is narrowly tailored to serve a compelling governmental interest falls on the State. *In re A.W.S.*, ¶ 17.

Just as it failed to do in the due process context, Appellee has likewise proffered no argument that Mont. Code Ann. § 41-3-110 furthers a compelling state interest, nor that the statute is narrowly tailored to serve such an interest. As the statute serves neither a compelling state interest, nor is it narrowly tailored to serve any state interest, under an equal protection analysis, § 41-3-110 is unconstitutional on its face and must be struck down.